

BLANK PAGE

FILE COPY

Office - Supreme Court, U. S.

FILED

MAR 10 1940

CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States

October, 1939, Term

Original No. 9

STATE OF ARKANSAS-----Plaintiff

Vs.

STATE OF TENNESSEE-----Defendant

PLAINTIFF'S BRIEF

✓ **JACK HOLT,**
Attorney General for the
State of Arkansas.

✓ **A. F. BARHAM,**

✓ **IVY W. CRAWFORD,**

✓ **HARVEY G. COMBS,**

✓ **D. F. TAYLOR,**

✓ **D. FRED TAYLOR, JR.,**
of Counsel.

BLANK PAGE

INDEX TO BRIEF

Statement	1
Cutoff (Moss) Island.....	2
Blue Grass Towhead.....	5
Summary of Argument.....	7
Argument	11
Introduction	11
Part I	12
Cutoff (Moss) Island.....	12
Part II	52
Blue Grass Towhead.....	52
Conclusion	56
Appendix	58

TABLE OF CASES

Arkansas vs. Mississippi (250 U. S. 39)-----	13, 14, 16, 17, 29, 33, 34, 35, 37, 39, 48, 50, 56
Arkansas vs. Mississippi (252 U. S. 344)-----	13, 14, 16, 17, 33, 56
Arkansas vs. Tennessee (246 U. S. 158)-----	13, 16, 17, 56
Indiana vs. Kentucky (136 U. S. 479)-----	34, 38, 49
Irwin vs. Wright (258 U. S. 219)-----	26
Lee vs. Osceola etc. District (268 U. S. 643)-----	26, 33
Lee Wilson & Company vs. U. S. (245 U. S. 24)-----	17
Louisiana vs. Mississippi (202 U. S. 1)-----	42, 43
Maryland vs. West Virginia (217 U. S. 1)-----	34, 41, 46, 48
Michigan vs. Wisconsin (270 U. S. 295)-----	45
Missouri vs. Kentucky (11 Wallace 395)-----	13
New Mexico vs. Colorado (287 U. S. 30)-----	44
Redfield vs. Parks (132 U. S. 239)-----	24
Rhode Island vs. Massachusetts (4 Howard 591)-----	34, 36, 39, 46, 48, 49
Shively vs. Bowlby (152 U. S. 1)-----	55
Van Brocklin vs. State of Tennessee (117 U. S. 151)-----	26
Virginia vs. Tennessee (148 U. S. 503)-----	34, 39, 42, 46, 48, 49
Wisconsin vs. Michigan (295 U. S. 455)-----	49

STATUTES CITED

Treaty between Great Britain, France and Spain, 1763, (3 Jenkinson's Treaties, 177).....	12
Treaty between United States and Great Britain, 1783, (8 Stat. 80, 82)	12
Act of Congress accepting cession etc., of North Carolina (1789) to United States, April 2nd, 1790 (Vol. i Ch. 6, p. 106).....	12
Treaty between United States and Spain, 1795 (8 Stat. 138, 140).....	12
Act of Congress admitting Tennessee into the Union, 1796 (1 Stat. 491)	12
Treaty between United States and France, 1803 (8 Stat. 200).....	12
Act of Congress granting certain lands to Tennessee, 1806 (2 Stat. 381)	18, 19
Act of Congress admitting Mississippi into the Union, 1817 (3 Stat. 348).....	13
Act of Congress admitting Arkansas into the Union, 1836 (5 Stat. 50, 51).....	13
Act of Congress pertaining to lands in Tennessee, 1841 (5 Stat. 412)	18, 19
Act of Congress granting certain lands to Tennessee, 1846 (9 Stat. 66)	18, 20, 21
Swamp Land Grant, 1850 (9 Stat. 519, 520).....	4, 17
Island Act (Arkansas), 1917 (Vol. II Pope's Digest (Ark.) Sec. 8739, p. 2221).....	5, 55

TEXT BOOKS CITED

Cooley on Const. Lim.....	21
Wood on Limitations (3rd Ed. by J. M. Gould).....	25

CONGRESSIONAL RECORD CITED

House of Representatives, Committee on Public Lands, report 134, January 27, 1846 (29th Congress, 1st Session).....	22, 23, 24
H. R. 140, a Bill reported by Public Lands Committee, January 27, 1846, (29th Congress, 1st Session).....	22, 23, 24

BLANK PAGE

IN THE

Supreme Court of the United States

October, 1939, Term

Original No. 9

STATE OF ARKANSAS-----Plaintiff

Vs.

STATE OF TENNESSEE-----Defendant

PLAINTIFF'S BRIEF

STATEMENT

This is another boundary line dispute between the States of Arkansas and Tennessee resulting from action of the Mississippi River, which separates the two States, in changing its course-of flow between said States.

The exceptions filed by the State of Arkansas to the Master's Report pertained only to the disputed boundary line along the river in the Northeastern corner of the State of Arkansas, in the vicinity of Moss Island and a more recent formation known as Bluegrass Towhead (Count One, Plaintiff's Complaint). These two formations are now separated from the mainland of Arkansas by the present channel of the said River.

Cutoff (Moss) Island

Moss Island was first known as Cutoff Island and was formed in the year 1821 when the river suddenly changed its course by cutting through a narrow neck of land severing said area from the mainland of Arkansas Territory. Immediately prior to this sudden change in the channel of the river, commonly known as an avulsion, the channel or thalweg of said river made a large horse shoe bend to the north, east and south, around said area. This is admitted in the Answer filed by the Defendant (pages 1 and 2, Defendant's Answer).

The old channel of the Mississippi River, as it flowed around this newly formed island, was subsequently abandoned by steam boats plying up and down said river, the newly formed cutoff channel being the new channel of navigation along said river. A much smaller river, named Obion, emptied into the Mississippi River at a point along this abandoned channel directly opposite the northern most part of said Cutoff Island. The old mouth of said Obion River is designated on Tennessee Exhibit 25 (Tr. 94 B) as just south of the letter "N" marked thereon in pencil (Tr. 44). This smaller river, Obion, maintained a continuous channel within the old Mississippi River bed around this newly formed Island, using only so much of said old river bed as necessary to accommodate itself. In using said old river bed the Obion River has kept an open channel between said newly formed Island and the original State of Tennessee, from the point where it emptied into the said abandoned channel of the Mississippi River, and where it now empties into the present Mississippi River (Tr. 64).

From the point where the Obion River emptied into the abandoned channel of the Mississippi River on the

northern side of the said Island, upstream along the old abandoned channel of the said Mississippi River, to the point where the original cutoff channel began, this old bed of the Mississippi River and its old banks are still plainly discernible, except for approximately one-quarter of a mile distance along an unimproved road in the vicinity of Chic, (Arkansas Exhibit 7, Tr. 76A—Tennessee Exhibit 25, Tr. 94B—Tr. 65). This Island is now attached to the mainland of Tennessee by said old bed of the Mississippi River, now a dry bed.

As early as the year 1839 the Governor of the State of Tennessee issued grants to portions of this Island, then known as Cutoff Island; these grants were based on entries and surveys in the Thirteenth Surveyors District of Tennessee, founded on Military Warrants held by different individuals which entitled them to a certain number of acres of land within the State of Tennessee. Some of these grants were based on Acts of the Legislature of the State of Tennessee passed in November, 1847. The first grant to a portion of this Island was made in 1839 (Tenn. Exhibit 7, Tr. 85); the next two grants to portions of this Island were made in the year 1848 (Tenn. Exhibit 8 and 10, Tr. 87 and 89); the next grant to a portion of this Island was in 1856 (Tenn. Exhibit 9, Tr. 88); and the last grant to a portion of this Island was made in 1867 (Tenn. Exhibit 11, Tr. 90). The people in possession of this Island under these grants recognized the jurisdiction of the State of Tennessee over said area and different parts of said Island were placed on the assessment rolls of Dyer County, Tennessee, and taxes were collected thereon by the officials of said State and County (Tenn. Exhibits 40 and 41, Tr. 95 and 102). The practice of the inhabitants of said area in recognition of the jurisdiction of the State of Tennessee over said area continued for a long period of years.

Cutoff (Moss) Island

Moss Island was first known as Cutoff Island and was formed in the year 1821 when the river suddenly changed its course by cutting through a narrow neck of land severing said area from the mainland of Arkansas Territory. Immediately prior to this sudden change in the channel of the river, commonly known as an avulsion, the channel or thalweg of said river made a large horse shoe bend to the north, east and south, around said area. This is admitted in the Answer filed by the Defendant (pages 1 and 2, Defendant's Answer).

The old channel of the Mississippi River, as it flowed around this newly formed island, was subsequently abandoned by steam boats plying up and down said river, the newly formed cutoff channel being the new channel of navigation along said river. A much smaller river, named Obion, emptied into the Mississippi River at a point along this abandoned channel directly opposite the northern most part of said Cutoff Island. The old mouth of said Obion River is designated on Tennessee Exhibit 25 (Tr. 94 B) as just south of the letter "N" marked thereon in pencil (Tr. 44). This smaller river, Obion, maintained a continuous channel within the old Mississippi River bed around this newly formed Island, using only so much of said old river bed as necessary to accommodate itself. In using said old river bed the Obion River has kept an open channel between said newly formed Island and the original State of Tennessee, from the point where it emptied into the said abandoned channel of the Mississippi River, and where it now empties into the present Mississippi River (Tr. 64).

From the point where the Obion River emptied into the abandoned channel of the Mississippi River on the

northern side of the said Island, upstream along the old abandoned channel of the said Mississippi River, to the point where the original cutoff channel began, this old bed of the Mississippi River and its old banks are still plainly discernible, except for approximately one-quarter of a mile distance along an unimproved road in the vicinity of Chic, (Arkansas Exhibit 7, Tr. 76A—Tennessee Exhibit 25, Tr. 94B—Tr. 65). This Island is now attached to the mainland of Tennessee by said old bed of the Mississippi River, now a dry bed.

As early as the year 1839 the Governor of the State of Tennessee issued grants to portions of this Island, then known as Cutoff Island; these grants were based on entries and surveys in the Thirteenth Surveyors District of Tennessee, founded on Military Warrants held by different individuals which entitled them to a certain number of acres of land within the State of Tennessee. Some of these grants were based on Acts of the Legislature of the State of Tennessee passed in November, 1847. The first grant to a portion of this Island was made in 1839 (Tenn. Exhibit 7, Tr. 85); the next two grants to portions of this Island were made in the year 1848 (Tenn. Exhibit 8 and 10, Tr. 87 and 89); the next grant to a portion of this Island was in 1856 (Tenn. Exhibit 9, Tr. 88); and the last grant to a portion of this Island was made in 1867 (Tenn. Exhibit 11, Tr. 90). The people in possession of this Island under these grants recognized the jurisdiction of the State of Tennessee over said area and different parts of said Island were placed on the assessment rolls of Dyer County, Tennessee, and taxes were collected thereon by the officials of said State and County (Tenn. Exhibits 40 and 41, Tr. 95 and 102). The practice of the inhabitants of said area in recognition of the jurisdiction of the State of Tennessee over said area continued for a long period of years.

This Island on which the said inhabitants recognized the jurisdiction of the State of Tennessee was, prior to the sudden change of the Mississippi River in the year 1821, physically attached to the Territory of Arkansas and a part of the area acquired by the United States in the year 1803 by Treaty with France, commonly known as the Louisiana Purchase. Subsequent to the admission of the Territory of Arkansas into the Union as a State (June, 1836), the United States Government caused this newly admitted State to be surveyed and sectionized. However, the Government Surveyors did not survey and sectionize this Island. The said Government Surveyors stopped when they reached the west bank of the newly formed cutoff channel of the Mississippi River and did not extend their survey to the west bank of the Mississippi River as it existed immediately prior to the sudden change in the channel. The easternmost land surveyed and sectionized by the said Government Surveyors being described as Section 12, Township 15 North of the base line, Range 13 East of the Fifth Principal Meridian, Arkansas. Under the Act of Congress, approved September 28, 1850, known as the Swamp Land Grant, the Governor of the State of Arkansas did not select any lands east of said Section 12, Township 15 North, Range 13 East (Tr. 74). By virtue of said grant, the State of Arkansas acquired title from the United States to only such lands as were selected according to the provisions of said Act.

Blue Grass Towhead

Subsequent to the year 1916 an off shore bar appeared in the Mississippi River on the east side of the main channel, which bar, by gradual process of the river, grew in size. This new formation is known as Blue Grass Towhead (Tr. 63-64) and is so designated by said name on the Hale's Point Quadrangle, Arkansas Exhibit 7 (Tr. 76A) and Tennessee Exhibit 25 (Tr. 94B). A "strip of land" lies between Blue Grass Towhead and Moss (Cutoff) Island (Tr. 64). During certain stages of the Mississippi River Blue Grass Towhead is physically attached to the west side of this "strip of land" when the chute between them is dry.

Blue Grass Towhead formed within the original cutoff channel made by said river, when it suddenly changed its course in 1821. This new cutoff channel moved slowly westward, gradually eating away the main Arkansas bank.

Prior to the filing of this suit an application was made to the State Land Commissioner of the State of Arkansas to purchase this new formation, known as Blue Grass Towhead, by authority of an Act of the Legislature of State of Arkansas known as the "Island Act" being Act No. 282, approved March 21, 1917, which Act provided the procedure for the disposition by the said State of Arkansas of Islands formed in navigable Rivers within the boundaries of said State (Tr. 185). Upon learning that the State of Tennessee claimed said new formation, or Blue Grass Towhead, to be within its boundaries, further action by the Land Department of the State of Arkansas was withheld, pending final adjudication of this boundary dispute now before this Honorable Court. (Tr. 185).

The Special Master, appointed in this case, found that, insofar as the sudden change in channel of the Mississippi River, known as an avulsion, was concerned, the eastern boundary of Arkansas Territory was not changed but remained as it was immediately prior to said avulsion, the middle of the old channel. Also that the eastern boundary of Arkansas Territory and the western boundary of the State of Tennessee were the same and when Arkansas Territory was admitted into the Union as a State in the year 1836 her eastern boundary was not changed on account of this avulsion but remained the same as Arkansas Territory. However, the Master further found that the State of Tennessee had exercised political jurisdiction over the area of land severed from Arkansas by this avulsion for a long period of years, and that the inhabitants of said area recognized the jurisdiction of said State, all of which, coupled with acquiescence on the part of the State of Arkansas, entitled said area to fall within the boundaries of the State of Tennessee on the theory of prescription and adverse possession. For the same reasons the Master also found that Blue Grass Towhead was likewise within the boundaries of Tennessee and that the true boundary between said States at this point was the present channel of the Mississippi River and not the channel of the river as it flowed immediately prior to the said avulsion.

In conformity with the order of this Court made and entered in this cause on October 23, 1939, the State of Arkansas duly excepted to that part of the Special Master's findings declaring the boundary to be the present channel of the river.

SUMMARY OF ARGUMENT

Introduction:

Explanatory division of argument into Two Parts.

Part I: Deals with that part of the area, affected by this boundary suit, known as Cutoff (Moss) Island.

(a) Question presented in this case and the early history dealing with the description of the same boundary line now in dispute.

(b) The true eastern boundary of Arkansas was thalweg of Mississippi River, defined by this Court in *Arkansas vs. Tennessee* (246 U. S. 158), *Arkansas vs. Mississippi* (250 U. S. 39) and *Arkansas vs. Mississippi* (252 U. S. 344) to be, "The middle of the main channel of navigation of Mississippi River as it existed when Treaty of Peace between United States and Great Britain was signed in 1783, subject to such changes as occurred since that time through natural and gradual processes, avulsions excepted."

(c) Cutoff (Moss) Island, an area of land, title to which is in the United States. The nucleus of this Island acquired by United States from France in 1803 by Treaty known as "Louisiana Purchase."

(1) Said area never surveyed and sectionized by United States, even though within original limits of Arkansas. Title did not pass to said State under the "Swamp Land Act of 1850" passed, September 28th of that year, (9 Stat. 519, 520).

(2) Title to said area did not pass to Tennessee by virtue of Act of April 18, 1806 (2 Stat.

381), February 18, 1841 (5 Stat. 412) August 7, 1846 (9 Stat. 66) or any other Acts.

(d) Rule of adverse possession and prescription misapplied because,

(1) Title still in United States.

(2) Party against whom the rule was applied does not hold the legal title to said Island.

(e) Rule of acquiescence misapplied, in view of this Court's opinion in *Arkansas vs. Mississippi* (250 U. S. 39) holding it was not necessary to rely on Acts of parties to determine where the true line, intended by Congress, should be on the ground, because,

(1) In case at bar the line intended by Congress, is still plainly discernible. -

(2) Obion River, which emptied into old channel of Mississippi, has kept open this old channel, continuously, around at least three-fourths of the Island.

(3) The remainder of the old bed of Mississippi River is now dry and plainly visible, except for a very short inconsequential distance at the upper end.

Therefore rule of thalweg described in *Arkansas vs. Mississippi*, supra, and *Arkansas vs. Mississippi* (252 U. S. 344) is true line, as contended by Complainant here.

(f) Leading opinions of this Court, applying rule of acquiescence in boundary disputes, differentiated from case at bar. These opinions clearly show this rule not applicable here.

- (1) Rhode Island vs. Massachusetts (4 Howard 591).
- (2) Indiana vs. Kentucky (136 U. S. 479).
- (3) Virginia vs. Tennessee (148 U. S. 503).
- (4) Maryland vs. West Virginia (217 U. S. 1).
- (5) Louisiana vs. Mississippi (202 U. S. 1).
- (6) New Mexico vs. Colorado (267 U. S. 30).
- (7) Michigan vs. Wisconsin (270 U. S. 395).
- (8) Wisconsin vs. Michigan (295 U. S. 455).

Part II: Deals with Blue Grass Towhead, an Island formation, separate from Cutoff (Moss) Island.

(a) Doctrine of adverse possession and prescription or acquiescence not applicable here, even if so regarding Cutoff (Moss) Island, because,

(1) Tennessee did not prove actual possession of this new formation, and,

(2) It was a physical impossibility for her to have actual possession, but for a very short time, since this new Island did not form until subsequent to the year 1916.

Therefore, if boundary line is to be drawn in accordance with such doctrine, then it should be established between Cutoff (Moss) Island and Blue Grass Towhead.

(b) This new Island formation belongs to Arkansas because,

(1) It formed in the bed of the new (cutoff) channel of a navigable river, which

(2) Flowed entirely within the limits of said State at that particular place,

(3) Being an Island in the Mississippi River belonging to Arkansas, is subject to control and disposal according to the laws of said State.

Conclusion:

Arkansas urges the adoption of the rule stated in *Arkansas vs. Mississippi* (252 U. S. 344), which would draw the line as contended in her complaint, namely, "The old channel of the river as it flowed prior to the avulsion of 1821".

The old bed of the Mississippi River along the line so contended is still plainly discernible, which fact definitely differentiates the instant case from the line of decisions of this Court favoring the theory of acquiescence and adverse possession.

Ignoring the recognized rule for determining the boundary between the States (rule of thalweg) and relying on the Special Master's theory of adverse possession and prescription, would necessitate drawing the line between the two formations known as Cutoff (Moss) Island and Blue Grass Towhead.

ARGUMENT

Introduction

Exceptions numbered 1 to 5, inclusive, cover that part of the Special Master's findings appearing under the title, "Conclusions upon Questions of Law", elaborately set out in paragraphs numbered 7 to 11, inclusive. These conclusions favor the State of Tennessee on the theory of prescription and adverse possession of Cutoff (Moss) Island. To avoid repetition, these five exceptions will be argued jointly in Part I of this argument.

Exception number 6 covers the Special Master's finding, under the same title, set out in the last paragraph, on page 76 of his Report, pertaining to Blue Grass Towhead, which conclusion also favors the State of Tennessee for the same reasons as applied to Cutoff (Moss) Island. This exception will be argued separately, as Part II of this argument.

Exceptions numbered 7 and 8, cover paragraphs 12 and 13 of the Special Master's findings appearing under the title, "Summary of Findings of Fact and Conclusions of Law", which pertain to both Cutoff (Moss) Island and Blue Grass Towhead. That part pertaining to Cutoff (Moss) Island will be argued in Part I, and that part pertaining to Blue Grass Towhead will be argued in Part II.

Exception number 9 covers paragraph 1 of, "Recommendations for Decree", on page 79 of the Special Master's report, which recommends that the claims of Arkansas to the lands be rejected and the boundary fixed in the channel of navigation of the Mississippi River as it existed when this suit was commenced. Inasmuch as this recommendation covers both Cutoff (Moss) Island and Blue Grass Towhead, the exception will be argued in Part I and Part II, respectively.

Part I

Cutoff (Moss) Island

(a) The question before the Court in this case is, "Where is the true boundary between the State of Arkansas and Tennessee at the place in dispute?"

The eastern boundary of the State of Arkansas is also the western boundary of her bordering neighbors, Tennessee and Mississippi, which boundary is the river Mississippi.

In the early periods of the history of this Continent, the Mississippi River was a very important boundary line. In the Treaty of 1763 between Great Britain, France and Spain (3 Jenkinson's Treaties, 177) it separated the British possessions from the French and Spanish. In the Treaty of 1783 between the United States and Great Britain (8 Stat. 80, 82, Art. II) this river was almost the entire western boundary of the British possessions acquired by the United States. In the act of North Carolina ceding certain western lands to the United States, passed in December, 1789, and accepted by Act of Congress of April 2, 1790, (Chap. 6, Vol. i, page 106), the Mississippi River was the western boundary of the ceded territory. In the Treaty between the United States and Spain, 1795, (8 Stat. 138, 140, Art. IV), the same boundary line was stated as separating the Spanish possessions from the United States. June 1st, 1796, when, by Act of Congress, Tennessee was admitted into the Union as a State (1 Stat. 491, c. 47) the Mississippi River constituted the western limits of said State. April 30, 1803, in the Treaty between France and the United States, known as the Louisiana Purchase, (8 Stat. 200), the same line formed a large part of the eastern boundary of the territory so acquired by the United States.

March 1st, 1817, when, by Act of Congress, the State of Mississippi was created and admitted into the Union (3 Stat. 348, c. 23) the same line described the major portion of the western limits of said newly created State. June 15, 1836, when, by Act of Congress, the then Territory of Arkansas was admitted into the Union as a State (5 Stat. 50, 51, c. 100), the same line, the Mississippi River, was stated as the eastern boundary of said State.

There was a slight variance of the words used in these treaties and Acts of Congress in describing this line, such as, "a line drawn along the middle of the River Mississippi", "the middle of the main channel", "the middle of the river", "up the river", and "down the Mississippi River." This Court has held that these different combinations of words, as applied to the thing they were describing, meant, "The middle of the main channel of navigation of the river."

Missouri vs. Kentucky (11 Wallace 395).

Arkansas vs. Tennessee (246 U. S. 158).

Arkansas vs. Mississippi (250 U. S. 39, 252 U. S. 344).

Boundary Line, Old Channel of River

(b) In *Arkansas vs. Tennessee*, (246 U. S. 158), decided March 4th, 1918, this Court was asked the same question presented here, "Where is the true boundary between the States of Arkansas and Tennessee at the place in dispute"? This court answered in the following words and figures:

"The true boundary line between the States, aside from the question of avulsion of 1876, is the middle of the main channel of navigation as it existed at the

Treaty of Peace concluded between the United States and Great Britain in 1783, subject to such changes as have occurred since that time through natural and gradual processes.”

In *Arkansas vs. Mississippi*, (250 U. S. 39), decided, May 19, 1919, this Court was asked the same question again, “Where is the true boundary between the State of Arkansas and Mississippi at the place in dispute?” This question was answered in the order of this Court in *Arkansas vs. Mississippi*, (252 U. S. 344), dated March 22, 1920, in the following words and figures:

“It is ordered, adjudged and decreed as follows, viz:

1. The true boundary line between the States of Arkansas and Mississippi, at the places in controversy in this cause, aside from the question of the avulsion of 1848, hereinafter mentioned, is the middle of the main channel of navigation of the Mississippi River as it existed at the Treaty of Peace concluded between the United States and Great Britain in 1783, subject to such changes as have occurred since that time through natural and gradual processes.

2. By the avulsion which occurred about 1848, and which resulted in the formation of a new main channel of navigation, the boundary line between said States was unaffected, and remained in the middle of the former main channel of navigation as above defined.

3. The boundary line between the said States should now be located along that portion of said river, or the bed of said river, which ceased to be the main channel of navigation as the result of said avulsion, according to the middle of the main navigable channel

as it existed immediately prior to the time of said avulsion.”

Thus it will be observed that this Honorable Court has heretofore clearly, positively and definitely stated that the true boundary line between Arkansas and her eastern neighbors, Mississippi and Tennessee, is, “*The middle of the main channel of navigation of the Mississippi River as it existed when the Treaty of Peace between the United States and Great Britain was signed in 1783, subject to such changes as occurred since that time through natural and gradual processes, avulsions excepted.*”

It is the same river boundary question before the Court now that was up for interpretation when the above rule was declared. It is the same river, the same line, only at another place. If this rule is to be applied at one place between the States, it must be applied at all other places on the same river where an extension of the same line is in dispute between the same States. If the boundary line between Arkansas and Tennessee is as above declared, at one place on the river, then it is certainly the same all along said river between said States.

Since the boundary line has been so declared and described, as the true boundary between Arkansas and Tennessee, then, in the case at bar, it necessarily follows that the boundary line lies in the channel of the river as it existed immediately prior to the avulsion, which occurred during the month of February in the year 1821, which channel was to the north, east and south of Cutoff Island, as contended by Arkansas.

The Special Master, appointed in this case, concluded, as a matter of law, that on June 15, 1836, when Arkansas was admitted into the Union as a State on an equal basis

with the other States of the Union, her eastern boundary was the old channel of the river as it flowed to the north, east and south of Cutoff Island, immediately prior to the avulsion of 1821, which created said Island when it severed a large portion of the Territory of Arkansas from the mainland. This boundary was likewise the western boundary of the State of Tennessee as described in the Act of Congress admitting her into the Union. This conclusion of law, on the part of the Master, is unchallenged by the State of Tennessee, and wisely so, because, in our opinion, the decisions of this Court rendered in *Arkansas vs. Tennessee, supra*, and *Arkansas vs. Mississippi, supra*, definitely establish the true eastern boundary of the State of Arkansas. Which, when applied to the case at bar, means, that the true boundary at the place in question is *the old channel of the river as it flowed around Cutoff (Moss) Island*.

After concluding the law to be as above, the Special Master applied the doctrine of adverse possession or prescription, because Tennessee had exercised political jurisdiction over Cutoff (Moss) Island for a long period of years and Arkansas had done nothing about it until just before this suit was filed, and therefore, the middle of the Cutoff (new) channel, as it now exists, was the true line.

He recommended that *Arkansas' claim to the lands* be rejected and *Tennessee's claim to the lands* be maintained. This suggests the question, "Who is the owner of Cutoff Island"? We still maintain that this is a boundary suit and in answer to our contention Tennessee says that she owns the Island, that it is hers, that she has had possession of it for a period of years, long enough to give the title to her and her successors in title. The Special Master allowed himself to be misled by opposing Counsel that this law suit was in the nature of an *ejectment suit*, and Arkansas

would have to prove her title to Cutoff Island before her contentions as to the location of the true boundary line could be maintained. This is not true. Furthermore, Arkansas does not claim title to Cutoff (Moss) Island. The title to Cutoff (Moss) Island has nothing to do with establishing the true boundary between the states in accordance with the rule declared in *Arkansas vs. Tennessee, supra*, and *Arkansas vs. Mississippi, supra*. Since ownership and title to the Island has been suggested, let us look further into the matter.

Unsurveyed Government Land, Title In United States

(c) It is conceded that Cutoff Island was a part of the State of Arkansas when admitted in 1836 and that the area comprising said State was acquired by the United States from France in the Louisiana Purchase; it is also conceded that Cutoff Island was not surveyed by the United States Government and therefore never sectionized as the State of Arkansas was. Likewise, it is unquestionably true that the title to Cutoff Island did not pass to the State of Arkansas under the Act of Congress dated September 28, 1850, known as the "Swamp Land Grant," which Act, among other things, conveyed swamp and over-flow lands, belonging to the United States within the State of Arkansas, to such State. (*Lee Wilson & Co. vs. U. S.*, 245 U. S. 24).

The Congressional Record is silent as to any Act of Congress conveying title to Cutoff Island to the State of Tennessee. Said Island was clearly beyond the western boundary of that State when admitted to the Union in 1796, in fact, it belonged to Spain at that time and was a part of the mainland.

Therefore, after acquiring the title to said area, the

United States has never parted with same and it is still *unsurveyed lands of the United States*.

In event our statement, that the Congressional Records are silent as to any acts of the United States Government conveying this Island to Tennessee, is challenged, in view of the Acts of Congress dated February 18, 1841 (Chap. 7, 2nd Session, 29th Congress, 5 Stat. 412), and the Acts of Congress dated August 7, 1846 (Chap. 92, 9 Stat. 66), let us discuss these Acts briefly.

First let us examine the title and first paragraph of the 1841 Act which read as follows:

“An Act to amend an Act entitled “An Act to authorize the State of Tennessee to issue grants and perfect titles to certain lands therein described, and to settle the claims to the vacant and unappropriated lands within the same,” passed the eighteenth day of April, one thousand eight hundred and six.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the State of Tennessee be, and hereby is, constituted the agent of the Government of the United States, with full power and authority to sell and dispose of the vacant, unappropriated, and refuse lands, within the limits of said State, lying south and west of the line commonly called the Congressional Reservation line, and described in the act to which this is an amendment; subject, nevertheless, to the following conditions and limitations, to wit:” (Chap. 7, Second Session, 29th Congress, 5 Stat. 412).

The Act of April 18th, 1806, referred to in above quotation, was passed by the 9th Congress at its First Session (2 Stat. 381), and established a particular line in the State

of Tennessee, known as the "Congressional Reservation line," for the purpose of defining the limits of vacant and unappropriated lands in the State of Tennessee, to be used as a guide or boundary in ceding to the State of Tennessee all of such unappropriated lands north and east of said Reservation line, subject, however, to certain conditions regarding entries and military land warrants issued by the State of North Carolina. This Act specifically stated that, (Sec. 2, p. 382)

"The United States do thereupon cede and convey to the State of Tennessee, all right, title and claim, which the United States have to the Territory of the lands lying east and north of the line herein before established, *within the limits of the State of Tennessee*, subject to the same conditions as are contained in the Act of the General Assembly of the State of North Carolina, entitled "an Act for the purpose of ceding to the United States of America, certain western lands therein described." (Italics furnished)

It seems that the State of North Carolina had issued innumerable military land warrants in satisfaction of military services rendered by soldiers of that State during the Revolutionary War and that a considerable number of these warrants were still outstanding at the time of passage of the Act of February 18, 1841, quoted above, which act specified that Tennessee should satisfy all legal and bona fide claims of North Carolina claimants upon said lands within the limits of said State of Tennessee south and west of the said Congressional Reservation Line; also that said State of Tennessee should make provision that the holders of land warrants from the State of North Carolina would be protected and allowed to locate upon the lands not previously located upon.

The language employed in this 1841 Act needs no interpretation because it is clear, void of any ambiguity and its meaning expressed in no uncertain terms. There is not a vestige of authority in either of these Acts which empowers Tennessee to issue grants or to take charge of a portion of the Territory or State of Arkansas cut off by the avulsion which occurred in the Mississippi River in this vicinity in February, 1821.

The title and first sentence of 1846 Act read as follows:

“An Act to surrender to the State of Tennessee all Title the United States have to Lands in Tennessee, south and west of the Line commonly called the Congressional Reservation Line, and to release to said State the Proceeds of such of said Lands as may have been sold by the State of Tennessee, as the Agent of the United States.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the United States hereby release and surrender to the State of Tennessee the right and title of the United States to all lands in the State of Tennessee, lying south and west of the Congressional Reservation line in said State, which may yet remain unappropriated, and further release and transfer to said State of Tennessee the proceeds of such of said lands as may have been sold by said State, not heretofore paid over to the United States, nor deposited subject to the order or use of the United States, under the authority of the Act of Congress of the eighteenth February, eighteen hundred and forty-one, entitled “An Act to amend an Act entitled ‘An Act to author-

ize the State of Tennessee to issue Grants and perfect Titles to certain Lands therein described, and to settle the claims to the vacant and unappropriated Lands within the same,' passed the eighteenth Day of April, one thousand eight hundred and six," (9 Stat. 66, Chap. 92).

Your attention is further directed to the very last provision embodied in said Act of 1846:

" And provided also, That all the said lands the release of which is herein provided for, and the proceeds thereof, shall be and remain subject to all the same claims, incumbrances, and liabilities, in relation to "North Carolina Land Warrants," or other claims of North Carolina, as the same would or could be subject to as regards the United States, if the same were not so as aforesaid released.

Approved, August 7, 1846."

These Acts Not Necessary of Interpretation

No Genius is necessary to understand the language of these Acts. The words employed convey,

"A distinct meaning, involving no absurdity and no contradiction between different parts of the same writing. In such a case there is no room for construction inasmuch as the meaning of the words embodied in the Act, being apparent on the face of the instrument, these words are the ones which alone we are at liberty to say were intended to be conveyed. That which the words declare is the meaning of the instrument, neither Courts or Legislature have the right to add or take away from that meaning." (Cooley, Const. Lim. p. 69-70).

Nevertheless, should there be some doubt in this Honorable Court's mind as to the purpose and intention of these Acts, let us see what happened in Congress before passage of the 1846 Act; what action did either House take that would convey a better understanding of what was in their minds when this Bill was passed.

Prior to the final passage of the 1846 Act, "The memorial of the General Assembly of the State of Tennessee," asking Congress to cede the lands south and west of the Congressional Reservation line in said State, was referred to the Committee on Public Lands in the House of Representatives. (29th Congress, First Session). Mr. McClernand, from that Committee on Public Lands, submitted Report No. 134 accompanying House Resolution No. 140 suggesting a Bill.

It appears from this Report (No. 134) that this Committee on Public Lands gave the "Memorial of Tennessee" very thorough consideration. From that report it seems that the history of the Public Lands in the State of Tennessee had been a perplexing subject of legislation for many years prior thereto. This Committee, in order to partly elucidate the subject, considered it with reference to two propositions,

"FIRST. Can the United States, consistently with the conditions upon which those lands were received, cede them away in absolute right?" (P. 1).

In discussing this question, the Act of North Carolina, ceding to the United States "certain western lands," approved in December, 1789, was mentioned and considered; said Act contained certain reservations, which in effect charged the whole territory ceded with the satisfaction of the military land warrants issued, or to be issued, by the

State of North Carolina, in favor of her officers and soldiers of the Revolution. All Acts passed by Congress since that date were considered in this Report, especially the Acts of 1806 and 1841 mentioned herein above.

From all of which the Committee, in substance, said that *these lands were acquired from North Carolina* and were now Public Lands of United States, within boundaries of State of Tennessee; that the United States had a right to cede that part of said area remaining vacant and unappropriated lands in the State of Tennessee to said State upon the *same conditions that said area was received from North Carolina.*

“SECOND. Would it be expedient to cede the lands of the United States in the State of Tennessee to that State?” (p. 3)

After considering this question the Committee reported favorably and House Resolution No. 140 reported a Bill, the last six lines of which read as follows:

“*And provided further, That the lands intended to be ceded by this Act shall be taken by the State of Tennessee, subject to the lien of any legal existing claim to the said lands, provided for in the deed of the State of North Carolina ceding the same to the United States, or by any Act of Congress passed in pursuance of the said Deed of Cession.*”

Thus you will see the words and phrases contained and embodied in the report of the House Committee on Public Lands, together with the Bill submitted with the House Resolution in connection with said Report, are also clear, distinct and free of ambiguity. It will be noted that every time any cession of land was made, it was specified, “Public and unappropriated lands in said State;” also that, “Said lands

were subject to the satisfaction of legal and bona fide North Carolina Military Land Warrants;" also the very words, "Lands intended to be ceded subject to liens provided in cession of the State of North Carolina to the United States of same lands."

Therefore the rights of Tennessee under these Acts were confined to the lands acquired by the United States from the State of North Carolina and within Tennessee's original boundary line. Thus it is very plain that Tennessee never acquired title to this Island under these Acts. Certainly it cannot now be said that these Acts intended to grant a portion of the Territory or State of Arkansas to Tennessee.

Rule of Adverse Possession Misapplied By Special Master

(d) Tennessee's claim of title to Cutoff Island and the *Master's ruling that she is entitled to the lands so claimed* resolve themselves to the conclusion that the State of Tennessee and its grantees can acquire lands of the United States by adverse possession. Such a conclusion is in direct conflict with the established principles of law as heretofore declared by this Court in the case of *Redfield vs Parks* (132 U. S. 239). In this case the Plaintiff obtained an entry from the United States to the land in question, which entry was issued in the year 1856 and paid for by the Plaintiff at that time, but, the patent was not actually issued until the year 1876. The Defendant claimed the land in question by virtue of adverse possession under color of title based on a *void State tax deed*. This Honorable Court held that the United States was not divested of its title to the land until the date the patent was issued, notwithstanding the issuance of an entry and payment therefor at a much earlier date, and that, "Limitations do not run against the

Government." Since the title did not pass out of the Government until the year 1875 then the Statute of Limitations could only run from that date. The Defendant lost the case because the adverse possession would have to date from the year 1875 which was not sufficient time to entitle him to the land.

Adverse possession of Cutoff Island could not possibly lie against the State of Arkansas because she did not have the title, the title was and still is in the United States. Adverse possession will not lie against a person in respect to property, to which that person cannot give a good title, or has no title,

"The rule is that a prescription can only operate against one who is capable of making a grant." (Wood on Limitation, 3rd Ed. by J. M. Gould).

It is therefore impossible for one to hold possession of property adversely to one who does not own said property. Cutoff Island is owned by the United States Government, and as above stated, against whom adverse possession will not lie.

We say that the United States holds the title to Cutoff Island in trust for the use and benefit of the State within whose boundaries said area lies and as a matter of law the Island is within the limits of the State of Arkansas, and, inasmuch as adverse possession will not lie against the United States Government, then it is still lands of the United States Government and still within the boundaries of Arkansas; the Master ruled that the area was within the boundary of Arkansas, except for adverse possession by Tennessee.

In view of the fact that title to Government lands in the State of Arkansas passed by patent from the United States Government to the State of Arkansas or to indivi-

duals, it is reasonable and logical to say that land within the State of Arkansas, title to which is still in the United States, is held by the United States in trust for the use and benefit of said State when said title passes out of the Government. The benefit the State would acquire from said lands certainly means that benefit she would acquire by virtue of the exercise of her power of taxation. A State cannot collect taxes on real estate, to which title is in the Government, until the title passes out of the Government. That such is the law, is clearly stated in *Lee vs Osceola and Little River Road Improvement District, Number 1 of Mississippi County, Arkansas* (268 U. S. 643, 45, Sup. Ct. Rep. 620) decided in 1925, when the Court held,

“Property of United States is exempt from taxation by State, so long as title remains in United States.”

This opinion followed the rule set out in *Van Brocklin vs State of Tennessee* (117 U. S. 151, 180), *Irwin vs Wright* (258 U. S. 219, 42 Sup. Ct. Rep. 293).

Thus it will be observed that when a State attempts to exercise its power of taxation of lands within its boundaries, belonging to the Government, and the occupant thereof resists, this Court has steadfastly held that the State must wait until the Government parts with its title before that State can collect real estate taxes on said land. The land cannot be taxed until the title passes out of the Government. Since lands, the title to which is in the United States, are not subject to adverse possession, and, since the title to the lands comprising Cutoff (Moss) Island is in the United States, therefore, the rule of adverse possession does not apply in the case at bar. Furthermore, since adverse possession will not lie against one who does not own the lands in question, and, since Arkansas does not own the

lands comprising Cutoff (Moss) Island, therefore, again, the rule of adverse possession does not apply in the case at bar. Under the circumstances here, we respectfully insist the Special Master misapplied the theory of adverse possession and prescription.

*Doctrine of Acquiescence, Also Misapplied By
Special Master*

(e) It is true that Cutoff (Moss) Island is inhabited by a few people who claim ownership through mesne conveyances beginning with a grant from the State of Tennessee. It is true that these inhabitants, for a long period of time, have, on account thereof, acknowledged Tennessee as their sovereign. They have submitted to the jurisdiction of the local authorities representing said State. It is also true that this Cutoff Island is now joined to the mainland of Tennessee on its north side by the old, now dry, bed of the Mississippi River, where the channel flowed prior to the cut off in 1821. It is likewise true that *this old river bed is still plainly discernible*, except for a comparatively small distance in the vicinity of Chic where it is now completely filled up and the old bank lines not visible to the casual observer (Tr. 65). The old channel of the Mississippi River has been kept open, continuously since the avulsion occurred, from the point where a much smaller river named Obion emptied into said old channel opposite the northernmost part of said Island, by the waters of said Obion River. (Tr. 44, 45, 64, 94B). Of course, this being a much smaller river than the mighty Mississippi, only that part of the old channel necessary to accomodate the waters of the Obion has been used. So, Cutoff Island has always been separated from the mainland of Tennessee, approximately three-fourths of the distance around said Island, by the Obion River flowing in the old channel of the Mississippi.

We think it very unreasonable to say that a small group of individuals can settle on an Island in the Mississippi River, the title to which is in the United States, and determine for themselves which State they shall recognize as their sovereign. If small groups of individuals are allowed to do this, there is no end to the controversies that are apt to arise from sanctioning such activity. Local officials of a State, by granting favors, certainly could persuade such groups into yielding to their political jurisdiction, especially so if the authorities of the other State were perhaps not quite so friendly and did not offer better propositions. No Genius is necessary to visualize that such a practice is not in keeping with the laws of this Country. This Court is not going to rely on such practices of a small group of inhabitants on an Island in the Mississippi River to determine the true boundary line between the States of Arkansas and Tennessee when it is NOT NECESSARY, not needed as an aid in determining the true boundary line, because, as in the case at bar, *the true boundary line is clearly discernible and distinguishable*, without such aid.

This is not the first time Arkansas has called on this Honorable Court to establish her eastern boundary and likewise the western boundary of one of her neighbors, neither is it the first time a large body of land has been severed from the territory comprising the State of Arkansas. The State of Arkansas is a much younger State than her eastern neighbors (Tennessee admitted in 1796, Mississippi in 1817, Arkansas 1836). The development of her overflow lands bordering on the great Mississippi has not been very rapid, comparatively speaking. As these 'bottom lands' are opened up and developed, it might be said that the State discovers the Mississippi River has, at some earlier date, changed its course, and cut off a sizable parcel of Arkan-

sas and left a broad expanse of water between its right bank and the area cut off.

In *Arkansas vs. Mississippi* (250 U. S. 39) decided May 19, 1919, we find a case very similar to the case at bar. The facts in that case were as follows: In the year 1848 the Mississippi River suddenly changed its course at a point along the river opposite Friar Point, Mississippi, which new course of the river cut off a portion of Arkansas. The old horseshoe bend of the river, which was the channel prior to the cutoff, gradually filled up and became unfit for navigation, parts of same completely filled up and the Island was physically attached to the mainland of the State of Mississippi, just as in the case at bar, Cutoff (Moss) Island is physically attached to Tennessee on north side of Island by the dry bed of Mississippi River. At the southern end of the bend, a large body of water remains, known as Horseshoe Lake, which is in the old bed of the river. There was also another body of water on this new Island north of Horseshoe Lake, known as Dustin Pond. After a lapse of a long period of years this suit was filed to establish the true line. The State of Mississippi claimed that the old course of the Mississippi River passed through the present location of Dustin Pond. That Dustin Pond had been recognized and considered the boundary between the States for many years, that the local authorities for the State agreed that this was the line and the decisions of the State Courts likewise recognized such line and Arkansas had acquiesced in this line for a long period of years. Arkansas contended that Horseshoe Lake represented the location of the channel of the old river. The State of Mississippi also contended that the course of the old river on the upper side of the bend was considerably to the westward of the course claimed by Arkansas. Mississippi apparently sustained her claim, in this instance,

from the position of the established line as shown on the Government map hereinafter mentioned found in the Appendix hereof. *Mr. Justice Day* in delivering the opinion of the Court said,

“ but it is insisted that Arkansas and Mississippi by their respective Constitutions have fixed the boundary line, as it is now claimed to be by the State of Mississippi, and that such boundary line has become the true boundary of the states, irrespective of the decision of this Court in *Iowa vs. Illinois*, *supra*, followed in *Arkansas v. Tennessee*, *supra*. We have examined the Constitutions and decisions of the respective states, and find nothing in them to change the conclusions reached by this Court in determining the question of boundary between states. A similar contention was made in *Arkansas v. Tennessee* as to the effect of the Arkansas and Tennessee legislation and decisions, and the contention that the local law and decisions controlled in a case where the interstate boundary was required to be fixed, under circumstances very similar to those here presented, was rejected. In that case the Arkansas cases, which are now insisted upon as authority for the respondent's contention, were fully reviewed. The Mississippi cases called to our attention, of which the leading one seems to be *Magnolia v. Marshall*, 39 Miss. 109, as well as the legislation of the State, seem to sustain the claim that local jurisdiction and right of soil to the middle of the river, is fixed by a line equidistant from the banks. But whatever may be the effect of these decisions upon local rights of property or the administration of the criminal laws of the state, when the question becomes one of fixing the boundary between states separated by a navigable stream, it was specifically held in *Iowa v. Illinois*,

supra, followed in later cases, that the controlling consideration is that which preserves to each state equality in the navigation of the river, and that in such instances the boundary line is the middle of the main navigable channel of the river. In *Arkansas v. Tennessee*, supra, 246 U. S. page 171, 38 Sup. Ct. page 304 (62 L. Ed. 638, L. R. A. 1918D, 258), we said:

“The rule thus adopted (that declared in *Iowa v. Illinois*) known as the rule of the ‘thalweg’, has been treated as set at rest by that decision. *Louisiana v. Mississippi*, 202 U. S. 1, 49 (26 Sup. Ct. 408, 50 L. Ed. 913); *Washington v. Oregon*, 211 U. S. 127, 134 (29 Sup. Ct. 47, 53 L. Ed. 118); 214 U. S. 205, 215 (29 Sup. Ct. 631, 53 L. Ed. 969). The argument submitted in behalf of the defendant state in the case at bar, including a reference to the notable recent decision of its Supreme Court in *State v. Muncie Pulp Co.* (1907) 119 Tennessee, 47 (104 S. W. 437), has failed to convince us that this rule ought now, after the lapse of 25 years, to be departed from.”

We are unable to find occasion to depart from this rule because of long acquiescence in enactments and decisions, and the practices of the inhabitants of the disputed territory in recognition of a boundary, which have been given weight in a number of our cases where the true boundary line was difficult to ascertain. See *Arkansas v. Tennessee*, supra, and the cases cited at page 172 of 246 U. S. (38 Sup. Ct. 301, 62 L. Ed. 638, L. R. A. 1918D, 258).”

In order that this Honorable Court might examine a picture of this boundary line so established in accordance with this opinion, a U. S. Government map prepared by the

Corps of Engineers, showing same, will be found in the Appendix of this Brief. On this map the Courts attention is respectfully directed to the fine dotted lines appearing on the Cutoff Island directly below Friar Point, Mississippi. These dotted lines show the original meander line of Arkansas to have been close to the center of said Island; it will also be noted that the boundary line was "pushed west" on the upper side of the old bend of the river just as the State of Mississippi contended it should be, inasmuch as the old channel immediately prior to the cutoff was declared to be the line. In pushing the line westward at this point a portion of land which reappeared within the original meander line of Arkansas was lost to the State of Mississippi. The State of Arkansas insisted that the line along this upper side of the old bend of the river should be farther east and be drawn along a line agreed upon by adjacent land owners in the immediate vicinity. According to the dotted lines on the Government map a part of this land was within the boundaries of the original State of Arkansas, and, no doubt, on the tax books of the particular county in that part of the State, and tax payments made thereon. When the old river bed dried up, that portion of this land washed away prior to the cutoff was again reclaimed by the Arkansas owner and it is presumed that tax payments resumed on the entire area to the agreed line, which line was acquiesced in for a long period of years. This is not shown in the opinion as given by Mr. Justice Day but we believe the record in the case will bear us out in such conclusions. This case strikes us as one where the land owners or occupants agreed on a line and this line was accepted by local state authorities and political jurisdiction exercised accordingly; that the agreed line was acquiesced in for a long time; *that the line so acquiesced in was not where the channel of the river was immediately prior to the Cutoff.* The rule of

the thalweg was held by this Court to control. Result, Arkansas not bound by her acquiescence in the line through Dustin Pond and Mississippi not bound by her acquiescence in the compromise line in the old course of the river on the upper side of the old bend. Notwithstanding express agreements as to the boundary line, backed up by exercise of political jurisdiction by local authorities of their respective States over affected area for a long period of years, and the practice of the inhabitants in recognizing such lines and local jurisdiction, together with long acquiescence by the States, the rule of the thalweg prevailed.

In the case at bar there were no agreements between the states that the boundary line should be the cutoff channel and not the old channel before the cutoff. Arkansas merely remained silent until just before this suit was instituted. In *Arkansas vs. Mississippi*, *supra*, there were agreements and *active acquiescence*, so to speak, by both states. In the case at bar, if there is any acquiescence, it is certainly *inactive*. The inhabitants or claimants of Cutoff (Moss) Island are nothing more than squatters on unsurveyed lands of the United States. With due deference to these squatters, they have a preferential right of entry to the lands so occupied by them, when surveyed by the Government. They will not be disturbed by the application of the rule of the thalweg. Tennessee has illegally collected real estate taxes from them since 1870 (Tr. 95, 117, 131), consequently by application of this rule, they will actually be relieved of further payments of real estate taxes, until the title passes out of the Government. (*Lee vs. Osceola et al*, *supra*).

The rule of the thalweg declared, in describing the boundary line between the states in *Arkansas vs Mississippi*, *supra*, (252 U. S. 344) hereinabove quoted, is clear-

ly applicable to instant case, and most certainly should not be 'junked,' cast aside and subordinated, as suggested by the Special Master.

The opinion rendered in *Arkansas vs Mississippi*, *supra*, (250 U. S. 39) referred to certain cases, passed on by this Court, in which the theory or doctrine of acquiescence and prescription was very clearly defined, and was held not to apply. It is very clear that the Court did not see fit to invoke the rule of acquiescence and prescription, where the boundary line was a distinct line "drawn by nature," clearly visible, it not being necessary to rely on the activities of the inhabitants, including individuals in charge of administering local jurisdiction of the States, to determine the line. These acquiescence cases mentioned in that opinion are also relied upon by the Special Master in support of his conclusion of law favoring Tennessee on the theory of acquiescence and prescription. They are as follow:

Rhode Island vs. Massachusetts (4 Howard 591).

Indiana vs. Kentucky (136 U. S. 479).

Virginia vs. Tennessee (148 U. S. 503).

Maryland vs. West Virginia (217 U. S. 1).

(f) In each of the above cases this Court declared the true boundary line was the line acquiesced in by the States and very definitely invoked the theory of acquiescence and prescription in denying the contentions of the Plaintiff in each instance. We will discuss each of these cases separately and endeavor to show the Court the distinction to be the same in each case and we obtained our 'cue' from the very words of *Mr. Justice Day* in the opinion of the Court written by him in *Arkansas vs Mississippi supra*, as follows:

“We are unable to find occasion to depart from this rule because of long acquiescence in enactments and decisions, and the practices of the inhabitants of the disputed territory in recognition of a boundary, which have been given weight in a number of our cases where the true boundary line was difficult to ascertain.” (*Arkansas vs. Mississippi*, 250 U. S. 39).

These words contained in the opinion dealt directly with the case then before the Court. We say the language of Mr. Justice Day, above quoted, is clear and distinct and that it dealt directly with the case then under consideration. We think this language employed in that opinion, in which the theories of acquiescence and adverse possession were rejected in favor of the rule of the thalweg, is of much importance, most especially because Mr. Justice Day also wrote the opinion of the unanimous Court in the case of *Maryland vs West Virginia, supra*, which was a very strong opinion favoring the theory of acquiescence and prescription. Certainly when the Mississippi case came up for hearing and this learned Justice was called upon to write the opinion of the unanimous Court, he was no novice for the job of understanding and properly applying the theory of acquiescence. He was thoroughly familiar with the doctrine of acquiescence and its proper application. We know of no better way of describing these cases than by using his own language as he referred to them thusly, “Which (decisions) have been given weight in a number of our cases where the true boundary line was difficult to ascertain.” We cannot help but firmly believe that Mr. Justice Day realized the confusion that would arise if the doctrine of the thalweg was subordinated to the theory of acquiescence. If it ever was the intention of this Court to subordinate the doctrine

of the thalweg to that of acquiescence and prescription, there was no better opportunity to do so than in the case of *Arkansas vs Mississippi, supra*. The line in each of these acquiescence cases was one surveyed by engineers or commissioners (except *Indiana vs Kentucky*) according to their interpretation of the description of the particular boundary as set out in the charter or Enabling Act creating such State. The line was one drawn by man. In each of these cases, when the dispute arose this Court felt justified in looking to the acts of the parties to ascertain the interpretation of the correct location of the boundary. In each instance the complaining party had acquiesced in the then recognized line for a long period of years and the Court did not feel justified in changing that line, which was *otherwise not discernible except for acquiescence*. There were no broad navigable rivers similar to the Mississippi, as a dividing line, there were no questions of thalweg to be considered and therefore the principles declared in these cases are certainly mis-applied, when allowed to control the case at bar.

(1) In *Rhode Island vs. Massachusetts*, (4 Howard 591), there was a dispute as to the true location of the boundary between the said States. Their respective charters specified that the line should extend due west from a point, "Three miles south of Charles River." Surveyors named Woodward and Saffrey drew the line, which was recognized by both States for a long period of years. When this suit was instituted the true location of the line intended by their respective charters could only be determined by relying upon the practices of the inhabitants in their recognition of same, as well as the practices of officials of the States

in the exercise of political jurisdiction. There was nothing else the Court had to rely on to assist and aid it in determining the true boundary line. It was a case where the true boundary line was otherwise not certain. Rhode Island contended that the Surveyors, in measuring off three miles south of Charles River, began at the head of a small branch which joined with another branch farther north and there formed the Charles River, whereas, they should have begun at the Charles River proper and not at this branch, and that the line should be several miles north of where it was actually drawn. But, Rhode Island, by its inhabitants and local officials, charged with administration of the State's affairs, in the area affected, had recognized the line drawn for a long period of time as the true boundary. To determine the true line it was necessary for the Court to decide just where the point of beginning should be. The Court considered this doubtful, as the point of beginning could have been located three miles south of the Charles River itself, or three miles south of a branch thereof, which could, for purposes of boundary, be considered the Charles River. The Court, therefore, felt itself justified in looking to the acts of the parties to ascertain an interpretation of the charters where it was called in question. Thus this is a case, where, just as *Mr. Justice Day* said in the opinion of *Arkansas vs. Mississippi, supra*, much weight was given to acquiescence and the practice of inhabitants where it was a case in which the true boundary was *difficult to ascertain*. The decision in the Rhode Island case was based on long acquiescence of Rhode Island in the Woodward and Saffrey line. The old bed of the Mississippi River is still discernible in the case at bar and this Honorable Court is not now being called on to

determine and establish a boundary *difficult to ascertain*. It is not necessary in the case at bar for the Court to rely on the acts of the inhabitants of Cutoff Island and the political jurisdiction exercised by the local authorities in their political control of said Island, in order to locate the old bed of the Mississippi River which held the channel of the river prior to the cutoff of 1821.

(2) In *Indiana vs. Kentucky* (138 U. S. 479), the dispute was over the location of, "The north bank of the Ohio river, at low water mark," which was the dividing line between the States. Kentucky succeeded to the same boundaries at the place in question as Virginia Territory, because she was carved out of that Territory. The original Virginia Territory included all of the Ohio River, at low water mark, along the line in dispute. No thalweg or channel of commerce of the Ohio was involved. The line was on the opposite shore of the river from Kentucky. There was an Island in the river, at the place in question, called, "Green River Island," which had become physically attached to Indiana due to the subsequent drying and filling up of an arm of the Ohio on the north or Indiana side of the Island. The State of Indiana was carved out of the Territory north of the Ohio River. The southern boundary of this Territory was the north bank of the Ohio, at low water mark, the same as the northern boundary of Kentucky. Surveyors of the Territory north of Ohio stopped at the bank of the river between that territory and Green River Island. This Island was a part of Virginia Territory and Kentucky succeeded to that Territory's rights to said Island. When that part of the Ohio River separating this Island from Indiana dried up, Ken-

tucky continued her exercise of jurisdiction over said Island, and very properly so. When this suit was filed it was difficult to accurately determine the exact location of the north bank. Indiana insisted that the north bank at low water mark was on the southern side of the Island; this could not be true, the north bank of a river could not possibly be the south bank of an Island in that river. However, the problem was to locate that north bank, and as an aid the Court followed the rule of acquiescence, as stated in *Rhode Island vs Massachusetts, supra*. Indiana had acquiesced in the line claimed by Kentucky for a long period of years. She had no reason to do otherwise, because Kentucky was, at all times, within her boundaries in claiming "Green River Island." The Court ruled that Indiana was bound by the line she had acquiesced in. It can very easily be said that this is another case where the boundary line was otherwise not discernible, that is, except for acquiescence. Clearly a case not applicable to the case at bar just as it was not applicable in *Arkansas vs. Mississippi, supra*, for the same reasons *Rhode Island vs. Massachusetts* was not applicable.

(3) *Virginia vs Tennessee* (148 U. S. 503), is a strong case supporting the theory of acquiescence and prescription, and the principles, so forcibly set out in the Rhode Island case and Indiana case, are followed. Here we have a boundary dispute as to the location of, "The parallel of latitude, thirty-six degrees, thirty minutes north," which was supposed to be the boundary between Virginia and the original colony of North Carolina and since the State of Tennessee was carved out of the original North Carolina Territory, likewise, the same boundary should separate Virginia from

Tennessee. The line involved begins at the northeastern corner of the State of Tennessee and runs west to the southwestern corner of the State of Virginia, a distance of about one hundred thirteen miles, thereabouts. Prior to the creation of the State of Tennessee, North Carolina Commissioners undertook to establish this line and the line they drew was known as, "Henderson line." Virginia was not satisfied and she caused the line to be drawn considerably south of the Henderson line, her line was called, "Walker line." Later, after Tennessee's admission into the Union, the two states agreed on a line, accepting neither the Walker nor the Henderson line, but drew the line equally distant between them. The line agreed upon began at the summit of White Mountain and ran due west, through gulches and over mountains, to the top of Cumberland Mountain. This line was accepted by both States by their respective Legislatures, and acquiesced in over a long period of years. Virginia came to the bar of this Court and asked that the line be established on the true parallel of latitude, namely, thirty six degrees, thirty minutes north, which actually was from two to eight miles south of the line acquiesced in. This Court refused Virginia's plea, on the theory of long acquiescence. It is very evident that this Court was compelled to rely upon the practice of the two States in the recognition of the boundary line in the exercise of their political jurisdiction over the area affected. It is clearly another case where the boundary line was *otherwise not discernible*, and just as in the Rhode Island case, the Court considered the matter doubtful as to the exact location of the line on the ground, and was thereby justified in looking to the acts of the litigating parties in determining the

issues presented. For the same reasons as hereinbefore stated, this case is not applicable to the one at bar.

(4) In *Maryland vs West Virginia* (217 U. S. 1) the dispute was in regard to the proper location of a line drawn north from, "The first fountain of the Potomac River," to the Mason-Dixon line which represented the southern line of Pennsylvania. There were two branches of the Potomac River, one extended northward and the other in a southern direction. As early as the year 1746 the first fountain of the Potomac River was designated by the establishment of a monument called, "Fairfax Stone," named after Lord Fairfax. In describing the western line of Maryland the Fairfax Stone was considered to be the location of the first fountain of the Potomac River, and in 1788 Surveyor Deakin ran the western boundary for the State of Maryland, which line was known as the Deakin line. Maryland did not accept the report of Surveyor Deakin favorably, nevertheless, did nothing about it. Later the two States, by agreement, hired a Surveyor, named Michler, to locate the line. He ran it as per instructions, using the Fairfax Stone as a starting point for the determination of the proper location of the line, the same point used by Deakin, however, when Michler reached the southern line of Pennsylvania he was about three quarters of a mile west of where the Deakin line intersected it. Michler, in making his report, stated that the inhabitants in that territory recognized the line of his predecessor, Deakin, as being the boundary between the States and that the difference between his line and Deakin's was probably due to the fact that Deakin's was run, "With a Surveyors compass." The line run by Deakin,

through rough and rugged country, was distinguishable only by relying upon the actions of the inhabitants in that territory in recognition of a line separating Maryland from West Virginia.

Maryland claimed that the head of the North branch of the Potomac River was, "The first fountain of the Potomac River." The head spring of this north branch was approximately one and three quarter miles west of the Deakin line and a like distance northwest of the Fairfax Stone. Considerably later, a monument was placed at the head of this north branch and called, "Potomac Stone." Maryland insisted that her true western boundary was a line drawn north from the Potomac Stone. *Mr. Justice Day*, in writing the opinion for the unanimous Court in this case, quoted at length from the opinion of *Mr. Justice Field* in *Virginia vs. Tennessee, supra*. This was another case in which a man-made boundary line was not distinguishable or discernible except by looking to the acts of the parties over a long period of years, as to their interpretation of the location of the line. After a lapse of many years, during which time the inhabitants in the area affected, as well as the local authorities or officials of Maryland, had recognized the Deakin line as the dividing line, the State of Maryland was bound thereby. The same theory was applied in this case as in the other cases on acquiescence above discussed, which are all clearly distinguishable from the case at bar. No test for the rule of the thalweg was involved.

(5) Another decision of this Court relied upon, in support of the Special Master's conclusions of law in favor of Tennessee, is *Louisiana vs. Mississippi*

(202 U. S. 1), a notable case because of the near trouble occasioned by the inhabitants of the States quarreling over the oysters in the bed of the Gulf out from the mainland of the respective States. This part of the eastern boundary of Louisiana, next to the State of Mississippi involved in this dispute, extended from the mouth of the Pearl River out to the Gulf, following the ship channel to the sea. The rule of the thalweg was applied here the same as applied to navigable rivers. In other words, the main channel of navigation from the mouth of the Pearl River to the Sea constitutes the boundary line and, of course, all Islands lying on the Louisiana side of this line were properly within the jurisdiction of that State. This line was never questioned by the State of Mississippi until the fishermen from that State exhausted the supply of oysters under the waters within its jurisdiction and then started moving over into the waters on the Louisiana side of the ship channel or thalweg and in the vicinity of the Islands within the jurisdiction of Louisiana. So here we have the doctrine of the thalweg prevailing and the theory of acquiescence running arm in arm with said doctrine. In other words, the boundary line in this sector between said States was adhered to for a long period of years and the line, so adhered to, *was the same as declared by the Enabling Acts of the two States* at the beginning of Statehood. The true boundary line was the thalweg or center of the main channel of navigation from the mouth of the Pearl River out to Sea and *this line was so recognized* by the inhabitants of Mississippi for a long period of time. So, after all, the rule of thalweg prevailed in this case. There is no solace to be found in the opinion of the Court in this case. It cer-

tainly does not support the Special Master's Conclusion that the rule of the thalweg should be subordinated to the theory of acquiescence.

(6) Another decision of this Court relied upon by the State of Tennessee, in support of the Special Master's conclusions of law, is *New Mexico vs. Colorado* (267 U. S. 30). In this case the line in dispute was the location of the 37th parallel of north latitude between its intersection with the 103rd and the 109th meridians of longitude west from Greenwich, the line separating the two states. This is another man-made line over rough and rugged country which was surveyed by an engineer named Darling in 1868, which line was also extended by Surveyors Major and Preston in 1874 and 1900. In 1903 a Surveyor named Carpenter ran the line, which was different from the previous line, the last one being farther south. New Mexico endeavored to have this last line (Carpenter) established as the true boundary, which would of course enlarge her territory. The Carpenter line was run by authority of the Commissioner of the General Land Office and its effect was to take a large strip of territory from Colorado and give it to New Mexico. The Commissioner of the General Land Office recognized the Carpenter line; however, when the President of the United States vetoed the joint resolution of Congress, approving the Carpenter line (about four years after it was run) as the proper boundary line, the Commissioner ceased to recognize it any more and reverted to the Darling, Major and Preston line theretofore recognized for a long period of years. This is another case in which the true boundary line was otherwise not discernible, that is, except for acquiescence. There was no natural boundary, like the

Mississippi River, as in the case at bar, but, on the other hand, the boundary was a line drawn by man, thereafter recognized and this recognition by the inhabitants and local public officials of said area aided the Court in determining the true line. This Court does not need "such aid" to determine the true boundary in the case at bar. The old river bed within which the channel of the Mississippi River flowed prior to the cutoff is still *plainly discernible*.

(7) Another decision of this Court relied upon by the State of Tennessee, in support of the Special Master's conclusions of law in her favor, is *Michigan vs. Wisconsin* (270 U. S. 295). This case involved the location of the true boundary line from the head waters of the Montreal River to the head waters of the Menomonee River and along said river to Green Bay, thence along the ship channel of Green Bay to Lake Michigan. Michigan became a state in 1837 and Wisconsin in 1848. Prior to Wisconsin's admission into the Union this line was run by a Surveyor named Cramm. A report of this survey was made to Congress and in the description of the boundary between the States in the Act admitting Wisconsin into the Union, this line was referred to, "As marked upon the survey made by Capt. Cramm". For convenience the discussion of this case was divided into three parts: First, Montreal River section; Second, Menomonee River section; and Third, Green Bay section.

In the Montreal River section the line was to be drawn from the head waters of that river in a direct line to the middle of the 'Lake of the Desert'. There was some question as to the location of the point of beginning for the drawing of this line inasmuch as the

head waters of this river were doubtful. There were two branches known as the Balsom and Pine which joined to form the Montreal River. When the line was run Surveyor Cramm used as a beginning point the junction of these two streams. After a lapse of many years, during which time Michigan recognized this line as the boundary, this suit was filed insisting that the head waters of the branch farthest west should have been used as a point of beginning by Surveyor Cramm. After extending the line through the middle of the Lake of Desert, Surveyor Cramm then surveyed a line through the wilderness to Lake Brule, which was supposed to form the head waters of the Menomonee River. There was some evidence in the record that the head waters of the Menomonee River was a Lake other than Brule, which lay farther north and east, which emptied into the Menomonee River. Michigan did not complain of Cramm's selection because she benefitted by his line in that instance. This line was also acquiesced in by the States. Thus, we have a man-made line forming the boundaries between the two states, recognized by said states to be the true dividing line. It is very apparent that this was a dispute over a line otherwise not discernible. Certainly the rule of acquiescence was applicable here just as it was in *Rhode Island vs. Massachusetts*, *Virginia vs. Tennessee* and *Maryland vs. West Virginia*, *supra*. Likewise, just as in those cases, the rule *should not* be applied to the instant case. No test for rule of thalweg was involved.

The Menomonee River section dealt with the line from Lake Brule, its head waters, along said river to Green Bay. There were a large number of Islands in this river, and it was difficult to determine which side

of the different Islands the channel of the river ran, because, in so many instances, there were channels on both sides equally as wide and deep, *making it impossible to say definitely where the line between the States was actually intended to be.* These facts were contained in Surveyor Cramm's report and, in order that misunderstandings in the future might be minimized regarding which Islands were in Michigan and which were in Wisconsin, he recommended that the line be declared to run on the Wisconsin side of all the Islands from the head waters of the Menomonee River (Lake Brule) to and including Quinnesec Falls, thereby placing all said Islands within the jurisdiction of the State of Michigan; from Quinnesec Falls to Green Bay the line was recommended to be on the Michigan side of all the Islands, thereby placing all of said Islands within the jurisdiction of the State of Wisconsin. This seemed to be an equitable division of the Islands in the Menomonee River and at the same time fixed the boundary line in clear and undisputable terms. This line was adopted in the description of the boundaries when Wisconsin was admitted into the Union. The description of the boundary as recommended by Surveyor Cramm was to be presented to the Legislature of Michigan for adoption, the same as was done by Wisconsin. No affirmative action was taken by the Michigan Legislature, however, several Constitutions adopting this line were submitted to the people and rejected but the rejections were not in reference to this boundary line. The rejections were based on reasons entirely foreign to the boundary question. After a lapse of about sixty years the people of Michigan adopted a Constitution which set out boundary line entirely different from the Cramm line. How-

ever, during the interim the line proposed by Cramm had been recognized and political jurisdiction exercised in accordance therewith. It is evident from the record that Michigan wanted portions of the Islands declared to be in Wisconsin and after a lapse of many years asked this Court to redraw the line in accordance with its wishes. Apparently it was necessary for the Court to rely on and give weight to the interpretations of the line as demonstrated by the actions of each State in administering their respective jurisdiction over the area affected, also the practice of the inhabitants in recognizing a line. Why? Because, "The true boundary line was difficult to ascertain", using Mr. Justice Day's words in *Arkansas vs. Mississippi*, supra, (250 U. S. 39) when he referred to *Rhode Island vs. Massachusetts*, *Virginia vs. Tennessee*, and *Maryland vs. West Virginia*, all supra, which cases were and still are the leading ones dealing with the proper application of the doctrine of acquiescence. Truly it cannot be said that a test of the rule of the thalweg is involved in the Menomonee River section of the case.

In the Green Bay section of this case the line was the most usual ship channel from the mouth of the Menomonee River, through Green Bay, to the center of Lake Michigan. It seems that there was more than one ship channel through Green Bay to Lake Michigan. The State of Michigan claimed that the channel intended for the line was the one that ran up Green Bay in close proximity to the westerly shore of the Door County Peninsula (Wisconsin) and in a northerly direction to a point opposite Death's Door channel, thence through that channel into Lake Michigan. Wisconsin claimed the line should be in the

channel which turned northward after leaving the mouth of the Menomonee, thence in a northerly direction to a point opposite the Rock Island Passage which passage was between Rock Island and St. Martin's Island, thence through said passage into Lake Michigan. Between the two conflicting lines were several Islands over which the State of Wisconsin had exercised political jurisdiction for a long period of years, undisputed by the State of Michigan. The dividing line between the States, insofar as the Islands were concerned, was declared to be in the channel claimed by Wisconsin. Just as in *Rhode Island vs. Massachusetts, supra*, the Court felt justified in looking to the acts of the parties to ascertain an interpretation of their boundaries. In other words, the line could have been in more than one place in the vicinity in dispute and still conformed with the description contained in the Enabling Acts of the two States. Michigan consented and agreed to the line claimed by Wisconsin for many years. It was difficult to ascertain just where the true line should be and the theory of acquiescence was very properly applied, in the same manner as this doctrine was applied in *Indiana vs. Kentucky, Virginia vs. Tennessee and Maryland vs. West Virginia, all supra*.

(8) It seems that in drawing up the decree to carry into effect the opinion of the Court mutual errors were made affecting the location of the line in Green Bay which necessitated the filing of another suit, *Wisconsin vs. Michigan* (295 U. S. 455). In this case the Court found that in the original suit the boundary line dividing the waters of the Bay between the states was not in issue and no evidence was offered for the determination of that question, that it was all

addressed to the controversy concerning the Islands in the vicinity of Door Peninsula. Further, that there was no main or most usual ship channel, the movements of sailing vessels were not limited to any particular channel in the Bay except to avoid Islands, shoals and reefs. It was impossible to identify any channel in the Bay as indicated by the Enabling Acts, hence the intention of Congress would have to be otherwise ascertained. The Court specifically stated that the doctrine of the thalweg was not involved here, that no right of either party to the use of the waters of the bay for navigation was involved and that territorial jurisdiction in respect to fishing constituted the occasion of the present controversy.

The Court's opinion in this last "skirmish" between the states, in the Green Bay sector, positively confirms our interpretation of the original suit, that the rule or doctrine of the thalweg was not involved. This Court's opinion was that Congress intended each of the states to have equality of right and opportunity in respect to these waters, including navigation, fishing and other uses, and that this equality could be best obtained by division of the area as nearly equal as could be conveniently made with due regard to the matters determined in the original suit.

We have hereinabove attempted to carefully review the leading opinions of this Court in which the doctrine of acquiescence prevailed, and, for the reasons stated, earnestly insist that such doctrine does not fit the case at bar. We have also attempted to review the opinion and order of this Court in *Arkansas vs. Mississippi* (250 U. S. 39, 252 U. S. 344), in which the rule of the thalweg was reaffirmed as the true test to be applied in determining the eastern

boundary of Arkansas, which case, we contend, is 'a perfect pilot' for the Court in determining its answer to the question first stated herein at the beginning of this argument, namely, "Where is the true boundary between the States of Arkansas and Tennessee at the place in dispute?" The answer to which we say is, "The old channel of the Mississippi River, as it flowed around area now known as Moss Island, immediately prior to avulsion of 1821."

Part II

Blue Grass Towhead

(a) The Special Master concluded that Tennessee's claim to Blue Grass Towhead should be sustained and the boundary line drawn accordingly, on the theory of prescription and adverse possession. In the first place we contend that this theory is not applicable to this case as a whole. In event, however, we have misinterpreted the opinions of this Court in its answers to the previous questions asked by Arkansas regarding the location of its true eastern boundary, and the rule recommended by the Master should prevail, we say the line should then be drawn in strict compliance with that rule. If the line is to be determined by Tennessee's acts of possession and control over the area affected, then the line should conform with the western limits of the territory actually in her possession and control over a period of time sufficient to establish title against the legal title holder of the property involved. If, the line is to be thusly determined, then, the burden of proof is on the Defendant (Tennessee) to prove the necessary elements vital to the establishment of title by adverse possession. The law placing this burden on such claimant is elementary.

(1) The record before the Court in this case does not contain one word of evidence offered by Tennessee in support of her claim to Blue Grass Towhead. Her claim of possession and control dealt with Cutoff (Moss) Island, and by inference claimed Blue Grass Towhead because it was now physically attached to the western side of said Cutoff (Moss) Island. It is true that this new formation is now connected with Cutoff (Moss) Island, during certain stages of the

river, by a dry chute bed. But, since it is a separate and distinct formation, independent of Cutoff (Moss) Island, proof of actual possession of it is absolutely necessary to sustain her claim to it. Purely for sake of argument let us assume that Tennessee did prove that she had actually been in possession and control of Blue Grass Towhead, this possession certainly could not have commenced until this new Island formed; it could not have commenced and remained continuously, unbroken, until this new Island built high enough above the water to preclude any breaks in the continuity of possession, due to the fact that the land was subject to inundation by the waters of the river during flood stages.

(2) The record very clearly shows that this Island did not begin forming until subsequent to the year 1916. Since we are assuming that Tennessee had actual possession of this new Island it is only reasonable to further assume that it was several years after it first began forming before it attained sufficient elevation to be subject to a claim. The greatest number of years that it is possible to say, with any degree of certainty, that Tennessee had actual possession of the nucleus forming Blue Grass Towhead, would be not more than fifteen years, if that long, because this suit was instituted in 1935. The Court's attention is directed to the following testimony of witness, O. W. Gauss:

"Q. Referring to Arkansas exhibit No. 7, do you know of your own knowledge when the area designated as "Blue Grass Towhead" formed?

A. That has formed since 1916. Now that is the area indicated on this exhibit as the "Blue Grass Towhead". There was a strip of land im-

mediately east of what is designated as "Blue Grass Towhead" but the area now indicated as Blue Grass Towhead is of recent formation, probably later than 1916". (Tr. 63, 64).

The Court will readily see that Blue Grass Towhead has not been in existence long enough to be held adversely against its true owner, by anyone. The above testimony of witness Gauss also sets at rest any question, if it should be questioned, that Blue Grass Towhead was a separate formation, clearly distinguishable, from Cutoff (Moss) Island.

Since Blue Grass Towhead is a separate formation, and has not been in existence a sufficient length of time for anyone to establish an adverse claim thereto, and since Tennessee has wholly failed to show that she has had possession of this new formation, then most certainly the claim of adverse possession to Blue Grass Towhead was not ripe when this suit was commenced. Hence, if the rule of prescription and adverse possession is to be applied in this case, the boundary line should be established between Blue Grass Towhead and Cutoff (Moss) Island, strictly according to Tennessee's actual possession.

(b) If this Honorable Court is inclined to believe that possibly Arkansas should prove her title and right to possession, as in an ejectment suit, which we still think the Master had in mind, before she can prevail, then it is a very simple matter for her to establish title to this new formation. In the first instance the Master concluded that when Arkansas became a State in 1836 it was the intention of Congress not to change the eastern boundary of Arkansas Territory, therefore, the line was the old channel of the river as it flowed around Cutoff (Moss) Island.

Since, at that time, the new (cut off) channel was in existence, and of course the river is a navigable stream, then the bed of this navigable stream within the boundaries of Arkansas became the property of said State when admitted into the Union in 1836. This Court has repeatedly held that beds of navigable streams belong to the State within whose limits said streams flow. Likewise it has been held that the beds of navigable streams in a territory of the United States are held in trust for the use and benefit of the future State to be carved out of that Territory and when the State is admitted into the Union the title to the said stream beds passes to said State.

Shively vs. Bowlby (152 U. S. 1).

In the case at bar Blue Grass Towhead formed within the new (cut off) channel, which, as aforesaid, was within the original boundaries of Arkansas. When any part of this bed of the river made its appearance as land, it belonged to Arkansas. Thus we have a clear cut proposition of Blue Grass Towhead, a comparatively new formation, belonging to Arkansas, and which formation has not been in existence long enough to be the object of a claim by prescription. Therefore, if the rule of adverse possession and prescription is to be invoked, then unquestionably Blue Grass Towhead is beyond the line to be drawn in accordance therewith, and still is the property of Arkansas. Being an Island in the Mississippi River, and the property of the State of Arkansas, it is subject to the jurisdiction and control of said State according to its laws pursuant thereto, notably Act 282 of the General Assembly of the State of Arkansas, approved March 21, 1917, known as the Island Act. (2 Pope's Dig. Sec. 8739, p. 2221)

CONCLUSION

In conclusion Arkansas respectfully insists that this Honorable Court has, by its opinions in *Arkansas vs. Tennessee* (246 U. S. 158) and *Arkansas vs. Mississippi* (250 U. S. 39, 252 U. S. 344), already declared the eastern boundary of Arkansas intended by Congress, likewise the western boundary of Tennessee and Mississippi, bordering her on the East, to be, "*The middle of the main channel of the Mississippi River as it existed in 1783, subject to such gradual changes as have occurred since then, avulsions excepted*", thereby setting at rest, the true test of the boundary between said States. Nature carved an *indelible* line between Arkansas and Tennessee in making the Mississippi River, "The Father of Waters", the boundary. *The old river bed at the place in dispute is still plainly discernible.* This is not a case where it is necessary to look to the acts of the parties, to ascertain the line intended by Congress. In every case passed on by this Court, in which the doctrine of acquiescence alone controlled, the boundary line in dispute was one, *not discernible*, it was one, *difficult to ascertain* exactly where the line should be, according to the descriptions adopted by Congress. The acts of the States in recognizing and acquiescing in the location of the described line, for a long period of years, constituted the States' interpretation of the location of the true line, and this Court adopted the same interpretation. In each instance it was a line, *otherwise not discernible*; a line, the true location of which was doubtful, so the one recognized was declared to be the proper one. Such is not so in the case at bar, there is no doubt as to the location of the old bed of the river, it is plainly visible, at least three-fourths of it is still used by the waters of the Obion, a much smaller river which emptied into the old channel.

The Special Master's recommendation would upset and cast aside the time honored rule governing the boundary between Arkansas and Tennessee.

His recommendation would have this Court ignore the fact that Cutoff (Moss) Island is unsurveyed lands of the United States, within the original limits of Arkansas.

His recommendation would further have this Court ignore the record evidence as to the formation of Blue Grass Towhead, and arbitrarily say, "Here Tennessee, you can have *this* Island too". Should his recommendation as to the law be applied to the record facts concerning Blue Grass Towhead, the line would have to be established between it and Cutoff (Moss) Island. There is no escape from the record evidence before the Court on this point.

Arkansas respectfully submits that according to the record in this case the boundary line must be drawn either, (a) in the old channel of the Mississippi River as it flowed prior to the avulsion, or (b) between Blue Grass Towhead and Cutoff (Moss) Island.

Respectfully submitted,

JACK HOLT,
Attorney General for the
State of Arkansas.

A. F. BARHAM,
HARVEY G. COMBS,
IVY W. CRAWFORD,
D. F. TAYLOR,
D. FRED TAYLOR, JR.,
of Counsel.

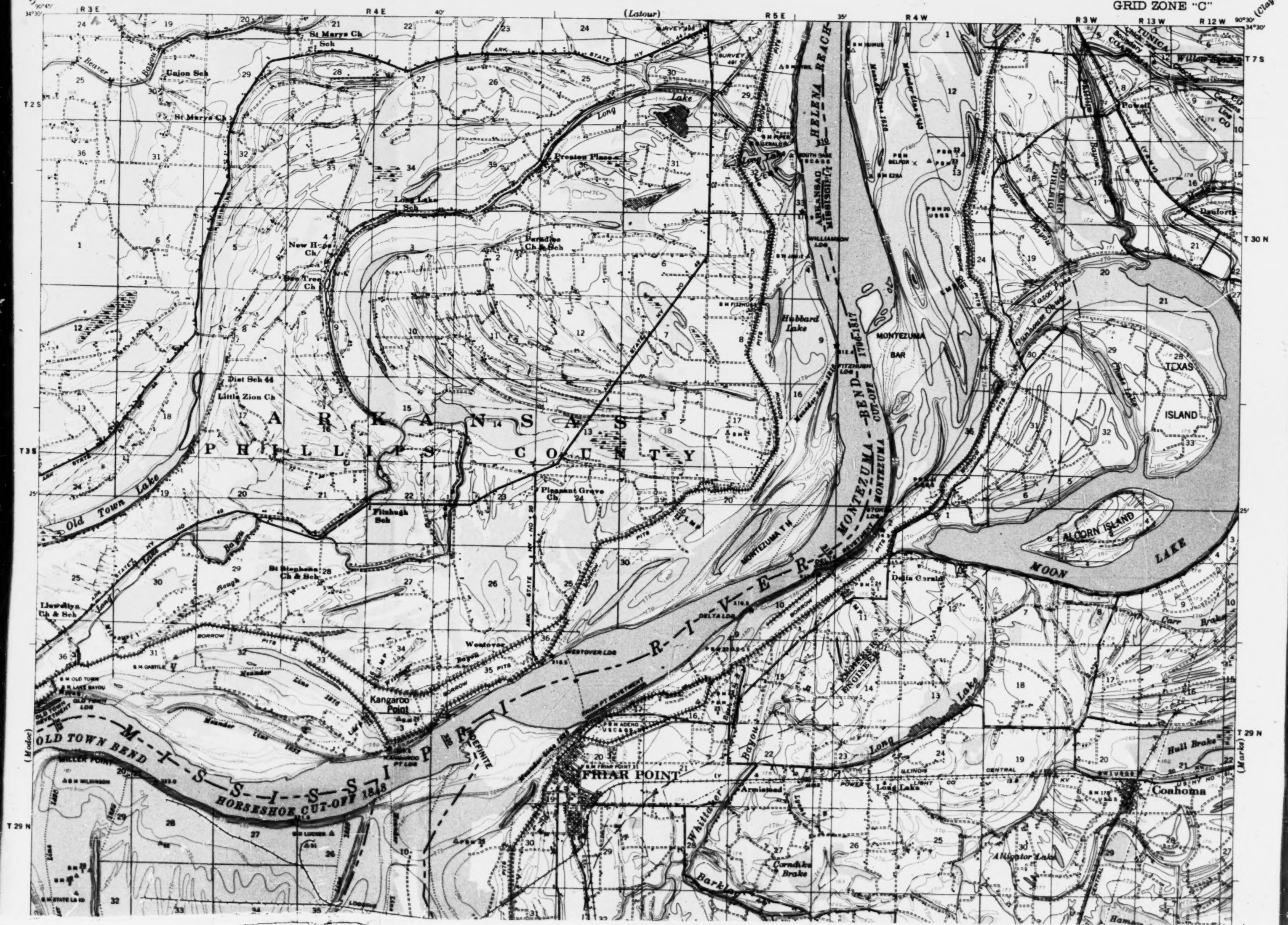
APPENDIX

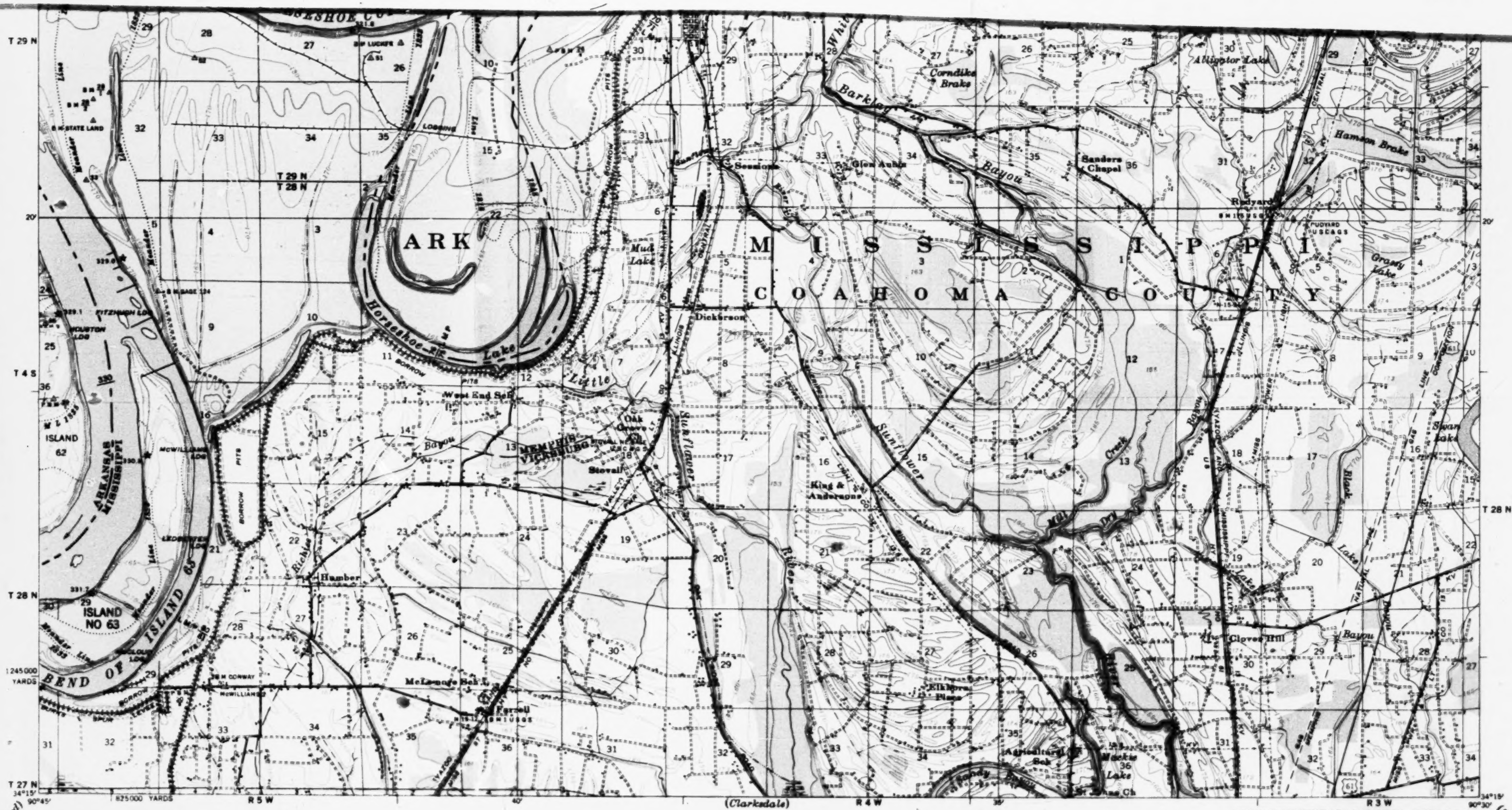
BLANK PAGE

WAR DEPARTMENT
CORPS OF ENGINEERS

2622:2150:/99:

ARKANSAS-MISSISSIPPI
FARRELL QUADRANGLE
GRID ZONE "C"





Prepared under the direction of the President, Mississippi River Commission.
Horizontal control by Mississippi River Commission and Corps of Engineers,
U. S. Army, Memphis District and U. S. Coast and Geodetic Survey.
Vertical control by Mississippi River Commission and Corps of Engineers,
U. S. Army, Memphis District.
Topography by Corps of Engineers, U. S. Army, Memphis District, 1930 and
the U. S. Geological Survey.
Revised by Mississippi River Commission, 1932-35.
Political boundaries are shown according to best available information,
and are subject to change where established by court decision.
Work under Flood Control Act of March, 1935.
Polyconic Projection, North American Datum.



Contour interval 5 feet
Datum is mean gulf level at Biloxi, Mississippi. Elevations differ from mean sea level elevations as determined
by the U. S. Coast and Geodetic Survey, by small fractions of a foot. Persons interested may secure elevations of bench
marks as determined by the latest U. S. C. & G. S. adjustment, by applying to the U. S. Coast and Geodetic Survey.

FIVE THOUSAND YARD GRID COMPUTED FROM "GRID SYSTEM FOR PROGRESSIVE MAPS
IN THE U. S. S. C. & G. S. SPECIAL PUBLICATION NO. 59

Additional copies may be procured from
The President, Mississippi River Commission,
Vicksburg, Miss. 10 cents per copy



ENGINEER REPRODUCTION PLANT, U. S. ARMY, FORT HUMPHREYS, D. C. 9478
1937
LEGEND
Levee Levee mile post LMP
Retards and dikes Levee station LS
Ravement Towhead TH
River Gage
Distances below Cairo Gage are shown at 5 mile intervals.

HARD IMPERVIOUSLY SURFACED ROAD
OTHER MAIN TRAVELED ROADS, GRAVEL
U. S. HY 61 OVERPRINTED 1930

FARRELL, ARK-MISS.
EDITION OF 1935